Supreme Court, U.S.
FILED
MAR 3 2000
CLERK

(2)

No. 99-1143

IN THE

Supreme Court of the United States

ABRAHAM D. SOFAER,

Petitioner,

v.

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT R. RIGSBY*
Corporation Counsel of the District of Columbia
CHARLES L. REISCHEL
Deputy Corporation Counsel
Appellate Division
Office of Corporation Counsel
District of Columbia
441-4th St., N.W., Sixth Floor
Washington, D.C. 20001
(202) 727-6252

Attorneys for Respondent District of Columbia Court of Appeals

JOYCE E. PETERS
District of Columbia Bar Counsel
MICHAEL S. FRISCH
Senior Assistant Bar Counsel
Office of Bar Counsel
515-5th St., N.W., Room 127
Washington, D.C. 20001
(202) 638-1501

Attorneys for Respondents District of Columbia Board on Professional Responsibility and Office of Bar Counsel

* *Counsel of Record*

158285

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

23pp

QUESTION PRESENTED

Whether the District of Columbia Court of Appeals properly imposed an informal admonition on Petitioner for violation of a local bar rule, based on his representation of a private client with respect to an airline bombing when he had been personally and substantially involved with the investigation and litigation concerning the same airline bombing when he was Legal Advisor to the Department of State?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Opinion Below	1
Statement of Jurisdiction	1
Statute and Rules	1
Statement of the Case	1
Reasons for Denying the Writ	5
Conclusion	14
Appendix	1a

TABLE OF CITED AUTHORITIES

Page

Cases:

Brown v. District of Columbia Board of Zoning Adjustment, 486 A.2d 37 (D.C. 1984) (en banc) .. 9

Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) 7

Goldfarb v. Virginia Bar, 421 U.S. 773 (1975) ... 7

In re Reback, 513 A.2d 226 (D.C. 1986) (en banc) .. 8

In re Ruffalo, 390 U.S. 544 (1968) 12, 13

In re Steele, 630 A.2d 196 (D.C.1993) 8

Middlesex Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) 7

Ohralik v. Ohio Bar Ass'n, 436 U.S. 447 (1978) .. 7

Statutes:

D.C. Code § 11-2501 (1995) 8

D.C. Code § 11-2502 (1995) 8

Cited Authorities

Page

Rules:

D.C. App. R. XI, § 1 (1996) 8

D.C. App. R. XI, § 6(a)(3) (1996) 11

District of Columbia Rule of Professional Conduct 1.11 9

District of Columbia Rule of Professional Conduct 1.11(a) 5, 6, 7, 8, 11, 13

OPINION BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. 1) appears at 728 A.2d 625 (D.C. 1999).

STATEMENT OF JURISDICTION

The judgment of the District of Columbia Court of Appeals (the "Court"), for which review is sought, was entered April 22, 1999. Petitioner filed a petition for rehearing or rehearing en banc, which the Court denied by order entered October 8, 1999. Petitioner filed his petition for writ of certiorari on January 6, 2000.

STATUTE AND RULES

The pertinent statute conferring jurisdiction on the District of Columbia Court of Appeals to discipline members of its Bar, the relevant Rule of Professional Conduct and the procedures prescribed by the Board on Professional Responsibility are set out in Appendix A to this brief.

STATEMENT OF THE CASE

This matter arises out of the application of a local ethical rule governing the conduct of members of the District of Columbia Bar, the organization to which all lawyers practicing in the District of Columbia are required to belong. It has its genesis in the bombing of Pan Am Flight 103 on December 21, 1988. The airplane was blown apart over Lockerbie, Scotland by plastic explosive hidden in a radio cassette player placed inside a suitcase on the flight. All 289 persons on board and 11 persons on the ground were killed. (Pet. App. 14a).

As the State Department's Legal Advisor from June 1985 to June 15, 1990, Petitioner received daily written briefing reports and occasional oral briefings that contained information about the progress of the United States Government's investigation of the bombing, a process that was ongoing throughout the remainder of his service in government. Petitioner also had access to classified communications and cables relating to the progress of the investigation and related diplomatic efforts involving the bombing. (Pet. App. 15a).

In 1989, families of the victims of the bombing filed wrongful death lawsuits against Pan Am and other defendants in several federal courts. In April 1989, the litigation was consolidated before the United States District Court for the Eastern District of New York. (Pet. App. 16a).

Pan Am served non-party subpoenas on the State Department and other government agencies seeking documents and the identification of witnesses related to a theory that the United States Government had had advance warning of the bombing but had failed to take appropriate steps to prevent it. (Pet. App. 16a). The Justice Department coordinated agency efforts to respond to the subpoenas and ultimately to quash them in light of its ongoing criminal investigation into the bombing. *Id.* An attorney in Petitioner's office drafted a memorandum recommending the State Department's response to the subpoena. *Id.* 17a. The memorandum was transmitted from Petitioner, in his capacity as Legal Advisor, and from the head of the State Department's Office on Counterterrorism to the State Department's Director General, who was responsible for responses to such subpoenas on behalf of the State Department. *Id.* The memorandum reflected that a search of

pertinent files had revealed the existence of approximately 400 documents responsive to Pan Am's request, described the classified nature of approximately half of the documents, and therefore contended that such documents could not be released under the "state secrets" privilege. *Id.* The memorandum further directed that an official of the State Department be designated as the appropriate witness to testify with respect to events described in the responsive documents. *Id.* Petitioner read the memorandum and its attachments and indicated his approval by initialing it. He also either attended meetings or was informed of the discussions at internal government meetings connected with the response to the subpoena and its underlying allegations. *Id.* 18a-20a.

On June 15, 1990, Petitioner left the State Department to become a partner in the Washington, D.C., office of a New York law firm (Pet. App. 22a). In late 1992, he was approached by another lawyer outside his firm to ascertain whether he would have an interest in representing Libya in connection with legal proceedings in the United States arising from the Pan Am Flight 103 bombing. *Id.* 23a. Thereafter, he undertook the representation of the Libyan government in connection with the ongoing civil and criminal disputes and litigation relating to the Pan Am bombing. On April 14, 1993, Petitioner and Libyan representatives executed a $3 million retainer agreement that called for monthly disbursements from the retainer at the rate of $250,000 per month. (Pet. App. 23a). Petitioner did not consult with the State Department prior to undertaking the representation. (Pet. App. 31a). He did not initiate an inquiry with the State Department to determine whether he had worked on any matters that arguably could be considered substantially related to his proposed representation of Libya.

Id. 24a-25a. Nor did he seek the views of the Department of Justice or the Ethics Committee of the District of Columbia Bar, both of which routinely provide attorneys with assistance in interpreting ethical rules related to conflicts of interest.

In preparation for the representation, he and his law firm took several steps, including an attempt to obtain the required license from the Office of Foreign Assets Control ("OFAC") of the Department of the Treasury for receipt of payments from Libya for legal services. *Id.* 27a. On May 10, 1993, OFAC issued a specific license to the law firm to receive payments of fees and expenses in connection with the pending criminal and civil cases, as well as any other United States court cases relevant to the Pan Am 103 litigation. *Id.* 28a. An attorney in Petitioner's law firm, who represented two plaintiffs seeking compensation from Libya for the bombing, was advised that he would have to leave the firm, if the firm were retained by Libya. *Id.* 28a-29a. After the retainer agreement was signed, the attorney withdrew from his position with the firm. *Id.* 29a.

On July 1, 1993, the firm received the first $250,000 retainer payment from Libya. (Pet. App. 32a). Petitioner and his law firm considered their representation of Libya to have begun on that date. Thereafter, Petitioner and his firm took several initial steps as part of the representation of Libya: surveying relevant treaties between the United States and Libya, researching procedures for filing an OFAC license with a court, and compiling documents in the Pan Am 103 civil case, the lawsuit in which Petitioner had been involved as Legal Advisor. Petitioner also sought relevant documents from Libya. *Id.* 33a.

On July 12, 1993, the firm issued a press release announcing that it had been retained by Libya to assist it in seeking a consensual resolution of litigation arising from the bombing. After negative public reaction, Petitioner and the law firm withdrew from the representation on July 16, 1993. (Pet. App. 33a-34a).

Subsequent to Petitioner's withdrawal, Bar Counsel of the District of Columbia initiated a disciplinary proceeding alleging that Petitioner had violated District of Columbia Rule of Professional Conduct 1.11(a). Bar Counsel investigated Petitioner's conduct and then informally admonished Petitioner for a violation of Rule 1.11(a). Petitioner rejected the informal admonition, so a Hearing Committee of the District of Columbia Board on Professional Responsibility (the "Board") held an evidentiary hearing concerning the alleged violation. The Hearing Committee found that Petitioner had violated Rule 1.11(a) and recommended an informal admonition. Pet. App. 135(a). Petitioner noted an exception to the Hearing Committee report, so the Board reviewed the report and heard oral argument on behalf of Petitioner and Bar Counsel. The Board affirmed the Hearing Committee's findings of a violation and also recommended the same sanction. *Id.* at 63.

Petitioner noted an appeal to the District of Columbia Court of Appeals (the "Court"). The Court affirmed the Board's conclusion that Petitioner had violated Rule 1.11(a) and affirmed the Board's order directing Bar Counsel to issue Petitioner an informal admonition. Pet. App. 9a.

REASONS FOR DENYING THE WRIT

This is a matter of purely local concern to lawyers practicing in the District of Columbia and admitted to the District of Columbia Bar. It involves no issues of national or general importance and no conflict with any decision in any other jurisdiction. It is also fact-intensive and fact-specific, rather than presenting a clear legal issue.

Petitioner seeks review of an order of the Court below directing that he be informally admonished for violation of Rule 1.11(a) of the District of Columbia Rules of Professional Conduct. The Rule states in relevant part:

> A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee.

The Court below concluded that Petitioner had violated the Rule when he undertook to represent the government of Libya in connection with criminal and civil disputes in litigation arising from the bombing of Pan American Flight 103, after having served as Legal Advisor in the United States Department of State and having taken part, personally and substantially, in the Government's investigation of the bombing and in related diplomatic and legal activities.

The Court below reached its conclusion on review of findings rendered by a Hearing Committee, empaneled by the Board that had conducted an extensive evidentiary hearing, had determined that the violation of Rule 1.11(a)

was established by clear and convincing evidence, and had recommended an informal admonition — the mildest form of public disciplinary sanction. (Pet. App. 130a-134a). The Board sustained the finding of a violation of Rule 1.11(a) by a vote of 6-1 and imposed the informal admonition. *Id.* 38a-62a, 64a. The Court adopted the Board's finding of a violation and sanction. *Id.* at 5a-9a.

Before the Court below, Petitioner contended that his various activities in the Department of State did not constitute a "matter," so as to prohibit his undertaking a representation in private practice on behalf of the government of Libya. (Pet. App. 2a). He further contended that his government activities had not been sufficiently "personal and substantial" to warrant the finding of an ethical violation. *Id.* 3a. The Court properly rejected these contentions, concluding that the ethical prohibition applied.

1. This Court previously has had occasion to note that each State:

> has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses. . . . The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice.

Middlesex Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 434 (1982). Accord: *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *Ohralik v. Ohio Bar Ass'n*, 436 U.S. 447, 460 (1978); *Goldfarb v. Virginia Bar*, 421 U.S. 773, 792 (1975).

Responsibility for the discipline of attorneys admitted to the bar of the District of Columbia is vested in the Court below, which has the status of a supreme court of a state. *See* D.C. Code §§ 11-2501, 2502 (1995); D.C. Bar App. XI, § 1 (1996). Disciplinary sanctions are designed to maintain the integrity of the profession, protect the public and the courts, and deter other attorneys from engaging in similar conduct. *In re Reback,* 513 A.2d 226, 231 (D.C. 1986) (en banc). "[The court's] purpose in conducting disciplinary proceedings and imposing sanctions is not to punish the attorney; rather, it is to offer the desired protection by assuring the continued or restored fitness of an attorney to practice law." *In re Steele*, 630 A.2d 196, 200 (D.C.1993).

2. Before this Court, Petitioner fashions an argument different from that which he made below. He now contends that he was sanctioned on the basis of conduct that, at most, created an "appearance of impropriety." Pet. at 11-12. The record amply contradicts this suggestion. Petitioner's principal contention below was that the application of Rule 1.11(a) permitted an impermissible shifting of the burden of proof. The Court below properly rejected this argument, noting that the Board had recognized that the case involved attorney discipline. Thus, the Court below and the Board viewed Petitioner's conduct, including the overlap of the two matters, from the perspective of Bar Counsel's obligation to prove an ethical violation by clear and convincing evidence. (Pet. App. at 5a.). The Board and the Court below agreed that Bar Counsel had met that burden.

The decision of the Court below makes clear that Petitioner was found to have engaged in an ethical violation based on his course of conduct in undertaking representation of Libya in a matter (the bombing) in which he was personally

and substantially involved as the Legal Advisor to the Department of State. He was not sanctioned based on an appearance of impropriety. Petitioner received regular classified briefings concerning the Government's investigation into the bombing. He participated personally and substantially in the Government's response to third-party subpoenas in the civil case arising from the bombing. He then left Government service and accepted representation of Libya that encompassed criminal and civil litigation relating to the very same bombing.

Petitioner's activities in government service as Legal Advisor to the Department of State involved the same bombing about which he undertook representation in private practice. Further, there is no basis to dispute that Petitioner was personally and substantially involved in both the bombing investigation and the resulting civil litigation as a government attorney. While Petitioner suggests that the application of the so-called "revolving-door" rule invites abuse, it is noteworthy that the District of Columbia's Rule 1.11 has been in existence, in its present and prior form, since the creation of the District of Columbia Bar in 1972. Government attorneys have entered private practice by the thousands since the adoption of the Rule without any suggestion that the rule is unworkable, unclear, or unfair. The Rule serves important public interests in protecting the Government's confidences and preventing use of confidences obtained during government service for private gain. *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 47-48 (D.C. 1984) (en banc). The fact that Petitioner can point to no other instance of the application of the Rule suggests that former government attorneys have no difficulty in understanding and complying with the Rule and that Bar Counsel has applied the Rule with restraint. The Rule was

applied here because Respondent undertook to represent Libya in the very same matter for which he was responsible as a government attorney.

It is clear that Petitioner understood the significance of the civil case in connection with the undertaking on behalf of Libya. He promptly caused the firm to obtain the files of the civil case for review. The firm determined to terminate its association with an attorney who represented a plaintiff seeking compensation from Libya for the bombing. Petitioner undertook the presentation without seeking ethics advice from either the Government or the District of Columbia Bar, both of which routinely provide this sort of advice.

Petitioner emphasizes that the Court below made no finding that he in fact actually received information in government service useful in the representation of Libya. Pet. at 14. It would impair attorney-client relations to require a detailed explanation of what occurred in the first representation as a predicate to finding an ethical violation in switching sides. Further, such a standard would be unworkable, because only interested parties would know about the substance of the protected information. This is particularly problematic in a situation involving a Government attorney operating at the top levels of the national security system. Here, the information received by Petitioner as a Government attorney was highly sensitive and shielded by the "state secrets" privilege, so it would be particularly inappropriate to require the identification of specific information received by Petitioner useful to his representation of Libya. In any event, because the Government and the private representation in this case involved the very same matter, *i.e.*, the bombing — an objective test — the Court below properly concluded that identification of particular information was not required to sustain the finding of an ethical violation.

3. Petitioner also contends that he was denied due process in that he somehow was subjected to continual changes in the disciplinary violation with which he was initially charged by Bar Counsel, on which he was tried before the Hearing Committee, and for which he was held accountable by the Board and the Court below. He contends that he was deprived of meaningful notice and opportunity to defend. This contention is purely rhetorical. At all times, Petitioner faced a charged violation of Rule 1.11(a) — nothing more or less. Initially, Bar Counsel issued to Petitioner an informal admonition for the violation, pursuant to the authority vested in Bar Counsel by D.C. App. R. XI, § 6(a)(3). Bar Counsel found a violation of Rule 1.11(a) for Petitioner's successive Government and then private representation involving the same bombing, based upon the evidence that Petitioner's representation of the Libyan Government was substantially related to matters that had come before him while he held the position of Legal Advisor at the State Department. Petitioner exercised his right to reject the informal admonition. Thereafter, Bar Counsel filed a petition charging that Petitioner had violated the same Rule identified in the informal admonition, Rule 1.11(a). A plenary hearing was held before a Hearing Committee to determine whether he had violated the Rule. The Hearing Committee carefully reviewed the evidence and issued a thoughtful, comprehensive analysis, setting forth the basis of its determination. The Board and the Court below affirmed the finding.

It is immaterial that the formal charge did not track, *in haec verba*, the language of the informal admonition. The charged violation was identical. (Pet. App. 102a-103a). In presenting the case for prosecution, Bar Counsel was properly permitted to develop and present evidence, beyond that available when the informal admonition was issued, in

order to bolster proof of the charged violation. It is likewise immaterial that the Hearing Committee sustained the charged violation on a basis not identical to that proposed by Bar Counsel. No rule of law required the Hearing Committee to share its proposed findings of fact and conclusions of law with Petitioner in advance of its report and recommendation to the Board. If Petitioner had additional arguments or evidence to present to the Hearing Committee in light of its Report, he should have asked for a rehearing before that tribunal. He did not do so.

By like token, if Petitioner believed that the Board had so substantially reformulated the operative definition of "matter" as to require him to defend a charge that he had had no meaningful opportunity to address, he should have asked the Board to reconsider its decision. He did not do so. His argument now is an afterthought and a makeweight.

The matter is not *In re Ruffalo*, 390 U.S. 544 (1968), on which Petitioner places principal reliance. There this Court concluded that an attorney subject to disciplinary authority is entitled to fair notice of the charge. The attorney had been subject to a proceeding in Ohio in which he was charged with 12 counts of misconduct. Two of the charges involved allegations that he had solicited clients through an agent. *Id.* at 546. He was not on notice that his employment of the agent would be considered an offense until after both the agent and he had testified at length on all material facts pertaining to that phase of the case. He was then subjected to a new charge, based on his hiring of the agent to investigate the agent's own employer. *Id.* Because disciplinary proceedings are quasi-criminal in nature, this Court concluded that the attorney had been denied a fair hearing:

> The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of the testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.

Id. at 551.

Nothing of the sort happened in the present case. Here, the charges against Petitioner were identical throughout the proceeding below. Petitioner was always on notice of the charge. The Hearing Committee, the Board and the Court below properly concluded that Petitioner was aware of the allegation from the outset and was provided a full and fair opportunity to contest it. Unlike the attorney in *Ruffalo*, he was not trapped by his own testimony. Petitioner was fairly on notice that his conduct in government and subsequent private practice formed the basis of the allegation that he had violated Rule 1.11(a) — an allegation sustained by clear and convincing evidence. He points to no discernible prejudice in that the finder of fact formulated the definition of "matter" with a slightly different focus than Bar Counsel. His suggestion that the Court below, in imposing the lightest form of public discipline available for the violation, treated him unfairly, must be rejected as unsupported by the record.

Petitioner's attack on the District of Columbia disciplinary process in his case, couched in terms of due process, is in reality nothing more than a dissatisfied litigant's expression of disagreement over the Court's interpretation of its Rule 1.11(a). The Court's fact-specific interpretation of its own Rule in a fact-intensive setting arising out of a unique set of circumstances does not create an issue meriting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT R. RIGSBY*
Corporation Counsel of the District of Columbia
CHARLES L. REISCHEL
Deputy Corporation Counsel Appellate Division
Office of Corporation Counsel District of Columbia
441-4th St., N.W., Sixth Floor
Washington, D.C. 20001
(202) 727-6252

Attorneys for Respondent District of Columbia Court of Appeals

JOYCE E. PETERS
District of Columbia Bar Counsel
MICHAEL S. FRISCH
Senior Assistant Bar Counsel
Office of Bar Counsel
515-5th St., N.W., Room 127
Washington, D.C. 20001
(202) 638-1501

Attorneys for Respondents District of Columbia Board on Professional Responsibility and Office of Bar Counsel

* *Counsel of Record*

APPENDIX

APPENDIX — STATUTES AND RULES

District of Columbia Code, Sec. 11-2501:

> "The District of Columbia Court of Appeals shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion." (July 29, 1970, 84 Stat. 521, Pub. L. 91-358, title I, Sec. 111; 1973 Ed., Sec. 11-2501).

District of Columbia Code, Sec. 11-2502:

> "The District of Columbia Court of Appeals may censure, suspend from practice, or expel a member of its bar for crime, misdemeanor, fraud deceit, malpractice, professional misconduct, or conduct prejudicial to the administration of justice. A fraudulent act or misrepresentation by an applicant in connection with this application or admission is sufficient cause for the revocation by the court of such person's admission." (July 29, 1970, 84 Stat. 521, Pub. L. 91-358, title I, Sec. 111; 1973 Ed., Sec. 11-2502; June 13, 1994, Pub. L. 103-266, Sec. 1(b)(112), 108 Stat. 713.)

District of Columbia Court of Appeals Rule XI Governing the Bar:

> Sec. 1. "*Jurisdiction.* (a) Persons subject to disciplinary jurisdiction. All members of the District of Columbia Bar, all persons appearing or participating *pro hac vice* in any proceeding in accordance with Rule 49(c)(1) of the General Rules of this Court, all persons licensed by this Court as Special Legal Consultants under Rule 46(c),

and all persons who have been suspended or disbarred by this Court are subject to the disciplinary jurisdiction of this Court and its Board on Professional Responsibility (hereinafter referred to as "the Board")."

Sec. 2. "*Misconduct*. . . . (b) Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the attorney's oath of office or the rules or code of professional conduct currently in effect in the District of Columbia shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. . . ."

Sec. 3. "*Disciplinary Sanctions*. (a) Types of discipline. Any of the following sanctions may be imposed on an attorney for a disciplinary violation . . . (5) Informal admonition by Bar Counsel . . ."

Sec. 6 "Bar Counsel shall have the power and duty . . . Upon prior approval of a Contact Member, to dispose of all matters involving alleged misconduct by an attorney subject to the disciplinary jurisdiction of the Court, by dismissal or informal admonition or by referral of charges."

District of Columbia Rules of Professional Conduct:

Rule 1.11 "(a) A lawyer shall not accept other employment in connection with a mater which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as

a public officer or employee. Such participation includes acting on the merits of a matter in a judicial or other adjudicative capacity."

Rules of the Board on Professional Responsibility:

Rule 6.3 "*Action Following Rejection of an Informal Admonition*. In the event that respondent rejects an informal admonition, respondent shall request in writing a formal hearing. This hearing shall be conducted in accordance with Section 8(c) of Rule XI of the Rules Governing the Bar except that Bar Counsel and the Hearing Committee may not add any charge to the petition arising out of the same circumstances that Bar Counsel was aware of at the time of the investigation, which charge was not included in the original informal admonition."